Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-695

BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI: MEMBERS OF THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, Individually and in Their Official Capacities, et al.,
Petitioners,

vs.

CHARLOTTE HOROWITZ,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioners herein pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, said judgment being entered July 16, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in 538 F. 2d 1317 (1976), and is set out in the appendix, infra P. A-1. The order of the United

States Court of Appeals for the Eighth Circuit denying Petitioners' petition for rehearing or hearing by court en banc, including the dissent thereto, entered on the 2nd day of September, 1976, is set out in the appendix, infra A-9. The opinion of the United States District Court for the Western District of Missouri is not reported, the opinion is set out in the appendix, infra, P A-12.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 16, 1976. The petition for rehearing or hearing en banc was denied on September 2, 1976. The jurisdiction of this court rests on 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is a medical student in a public institution of higher education entitled, pursuant to the Constitution of the United States and the Fourteenth Amendment thereto, to a notice of charges and a hearing prior to dismissal from medical school for deficiency in academic performance?

2. Does the dismissal without a formal hearing of a medical student from a public institution of higher education for deficiency in academic performance impose such a stigma or disability upon the student as to amount to a deprivation of liberty under the Fourteenth Amendment, when the student has prior notice and knowledge of the deficiency and the subsequent dismissal and reasons therefor were not made public?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the due process clause of the Fourteenth Amendment to the United States Constitution, said due process clause stating ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .".

STATEMENT OF THE CASE

The School of Medicine of the University of Missouri-Kansas City has as a primary goal that of educating and graduating medical students who are safe physicians with the capability of rendering primary care to the general public. (Memorandum and Opinion, App. p. A-12, Stip. III 81; Def. Exhibit 1, 2; T. 90, 148-152, 370-375)[1]

Respondent (Plaintiff in the Federal District Court, Appellant in the Eighth Circuit Court of Appeals) was admitted as a student with advanced standing at the University of Missouri-Kansas City School of Medicine for the academic year beginning in August, 1971 (Stip. III, 22). In March, 1972, some seven months after being admitted to the School, Respondent was notified by her docent (supervising physician and teacher) that Respondent's performance in pediatrics was deficient in that her rapport with patients and her expertise in coming to the funda-

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[1] Memorandum and Opinion refers to Federal District Court Order and Memorandum set forth in the Appendix.

Stipulation refers to Stipulations of the parties filed in Federal District Court.

Defendants' exhibits refers to petitioners' exhibits introduced in Federal District Court.

T. refers to official transcript of Federal District Court trial Proceedings filed in Court of Appeals.

mentals of the clinical problem were below those of her peer group, that she was erratic in her attendance in the pediatric clinic and that several physicians were disturbed because of Respondent's lack of personal hygiene (Stip. III 34: T. 107-108, 229).

On July 5, 1972 following a review by the Council on Evaluation of the School of Medicine (the body charged with the responsibility for the review of the academic evaluation of student performance) and the confirmation of the action by the Coordinating Committee of the School of Medicine (the body charged with review power over decisions and or recommendations of the Council on Evaluation), the Dean of the School of Medicine notified Respondent in writing that she was placed on probation and that her performance in the School of Medicine was deficient, said notification specifying the deficiencies. The Dean of the School of Medicine explained and discussed with Respondent each point mentioned in the notification of deficiencies (Stip. III 45; T. 235, 386-387; Def. Ex. 8).

On December 26, 1972 the Council on Evaluation, following a review of Respondent's academic performance, recommended that Respondent be continued on probation and that Respondent not be considered as a candidate for the M.D. degree in June, 1973 (Stip. III 54, 55, 56). The recommendation was approved by the Coordinating Committee of the School of Medicine and in January, 1973 Respondent was orally advised by her docent, the Chairman of the Council on Evaluation, and the Dean of the School of Medicine of her specific performance deficiencies, all of which were confirmed by written communication to Respondent on February 7, 1973 (Stip. III 57, 58; Def. ex. 9). The written communication to Respondent provided in part:

> ". . . and you must make very marked and very substantial improvement in several areas. These are: clinical competence, peer and patient relations, personal hygiene, and ability to accept criticism.
>
> This means that these very substantial and marked improvements must take place and be satisfactory to the Council on Evaluation or you will not be able to continue in the Medical School after May of this year."

Pursuant to Respondent's request to appeal the decision of non-graduation, the Dean of the School of Medicine established a procedure for the Respondent to undergo oral and practical examinations by seven experienced physicians, none of whom had had appreciable contact with Respondent during her attendance at the School of Medicine (Stip. III 59). The question presented to the seven examining physicians was that of whether or not Respondent was deemed qualified and competent to graduate in June of 1973 (Stip. III 60, 61; Def. ex. 22; T. 50 51). Upon receiving individual reports from the seven physicians (a minimum of five stating Respondent not qualified for graduation in June, 1973) (Def. exs. 15-21; Memorandum and Opinion App. p. A-12) the Council on Evaluation reaffirmed its earlier recommendation that Respondent not gradute in June, 1973, which recommendation was confirmed by the Coordinating Committee and approved by the Dean of the School of Medicine (Stip. III 71, 74; Def. ex. 12).

The Council on Evaluation reviewed the performance evaluations of Respondent for the period of time from December, 1972 through the date of the meetings of the Council on Evaluation (May 14, 1973 and May 28, 1973) to determine whether or not there had been a marked improvement in the performance of Respondent as called for in the previous written notification to Respondent. The Council on Evaluation recommended that Respondent, because of deficient performance and lack of improvement therein, be dropped from the School of Medicine (T. 463; Stip. III 73). The recommendation was confirmed by the Coordinating Committee, (Stip. III 77) the Dean of the

School of Medicine, and the Provost for Health Sciences (Stip. III 78).

Petitioners did not at any time communicate or reveal to any individual, group or organization outside the University of Missouri any information concerning Respondent's Medical School performance deficiencies, her non-graduation, her dismissal, or the reasons therefor. None of the information was ever made public.

Respondent initiated this action in the United States District Court for the Western District of Missouri under 42 U.S.C. 1983 and alleged a denial of rights guaranteed by the Constitution and laws of the United States by the failure of Petitioners to graduate Respondent; a deprivation of due process in that the School failed to provide Respondent with a notice of charges and hearing on the issue of evaluation of academic performance; a denial of equal protection in that evaluation of Respondent's academic performance was carried out in a manner that caused Respondent to be disadvantaged by reason of sex, religion and physical appearance; that the decision to not graduate Respondent was arbitrary, capricious, unreasonable and that Petitioners did not follow their own rules in granting Respondent an appeal to the panel of seven physicians. Relief sought by Respondent included declaratory and injunctive relief seeking to enjoin the dismissal of Respondent from Medical School; in the alternative to order reinstatement of Respondent in good standing; alternatively to graduate Respondent and to award compensatory damages and exemplary punitive damages.

On November 14, 1975, after a two day trial before the Court, judgment was entered for Petitioners as to all claims asserted by Respondent including that Petitioners had afforded Respondent procedural due process in that the School went beyond the requirements of procedural due process by affording Respondent

the opportunity to be examined by seven independent physicians in order to be absolutely certain that their grading of the Respondent in her medical skills was correct. The trial court specifically found that Respondent was repeatedly cautioned of her deficient performance and that her docent had gone to great lengths and extremes in his efforts to assist Respondent in every phase of her education and that he repeatedly called to her attention deficiencies noted by the school authorities (Memorandum and Opinion App. A-12).

By opinion dated July 16, 1976 the United States Court of Appeals for the Eighth Circuit reversed outright the judgment of the trial court and found that the Fourteenth Amendment to the Constitution of the United States required a notice of charges and hearing before a medical student could be dismissed from medical school for academic performance deficiencies (App. A-1).

Petitioners' request for a rehearing or hearing en banc was denied by a five to three vote of the United States Court of Appeals for the Eighth Circuit on September 2, 1976 with a written dissent being made a part of that order (App. A-9).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The United States Court of Appeals for the Eighth Circuit, in reversing the United States District Court for the Western District of Missouri, in the case at bar is the first court to hold that the due process clause of the Fourteenth Amendment to the Constitution of the United States requires a public institution of higher education to give a medical student a notice of charges and hearing (and accorded all other procedural due process rights) before the student can be dismissed for deficiencies in academic performance. The Court held that such a dismissal imposed a stigma upon the student and thus deprived the student of liberty within the meaning and intent of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The court placed total reliance for legal authority upon the decisions rendered by the Supreme Court of the United States in the cases of *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972) and upon its own decision in the case of *Greenhill v. Bailey*, 519 F.2d 5 (8th Circuit, 1975).

It is respectfully submitted that the opinion of the United States Court of Appeals for the Eighth Circuit in the case at bar is in direct conflict with the decision of the United States Supreme Court in the cases of *Bishop v. Wood*, 96 S.Ct. 2074 (1976) and *Board of Regents v. Roth*, supra. It is further submitted that the opinion in the case at bar is in conflict with holdings of other United States Circuit Courts of Appeal and in conflict with opinions rendered by several United States District Courts.

In the *Roth* decision, supra, the Supreme Court establishes that for there to be a deprivation of liberty there must be a charge that will seriously damage one's standing and associations in his community; that one is guilty of dishonesty or immorality; or

where one's good name, reputation, honor or integrity is at stake because of what the government is doing to the individual. As stated by the Supreme Court in *Roth*, supra, at 575, note 13;

> "Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employer would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty'."

It is submitted that the dismissal of a student for the pure and simple reason of deficient academic performance from a professional school does not arise to the level of being considered a deprivation of liberty.

The Supreme Court of the United States followed *Roth*, supra, in its recent decision in *Bishop v. Wood*, supra, wherein it held that a public employee was not deprived of liberty when he was terminated from public employment without a notice of charges and a hearing. As in the *Bishop* case, the Petitioners in the case at bar did not make a public disclosure to any individual, group, organization, or association, the dismissal of Respondent from Medical School or the reasons therefor. A medical student, particularly where the trial judge had found that the sole reason for dismissal was deficient academic performance, does not have greater "liberty" rights than a public employee. The nature of a student's interest is certainly no greater than the nature of the interests of a public employee. If a public employee is not constitutionally entitled to refute a city manager's judgment at a hearing, then a medical student should not be deemed entitled to the right to refute a medical school's academic judgment and evaluation at a hearing.

It is submitted that there is disagreement among the judges of the Eighth Circuit Court of Appeals upon the legal principles involved, the meaning and intent of the Supreme Court of the United States in its decisions of *Board of Regents v. Roth*,

supra, and *Bishop v. Wood*, supra. This disagreement is shown by the dissent written by the Chief Judge, joined by two other judges, in the order denying Petitioner's motion for rehearing or hearing en banc, appendix P. A-9. This dissent shows that there is even disagreement as to the meaning and intent of the court's earlier decision in *Greenhill v. Bailey*, supra, and it is interesting to note that the author of the *Greenhill* decision joined in the dissent to the court's order in the case at bar.

The decision of the Eighth Circuit Court of Appeals in the case at bar is in conflict with the decisions of other circuit courts of appeal, specifically *Mahavongsana v. Hall*, 529 F.2d 488 (5th Circuit, 1976), and *Gaspar v. Bruton*, 513 F.2d 843 (10th Circuit, 1975). Prior to the decision in the case at bar, the most far reaching decision on the question of constitutional retraints on the public institution is that of *Gaspar v. Bruton*, supra. In that case the court held at page 851:

> ". . ., in order to satisfy Due Process prior to termination or suspension of a student for deficiencies in meeting minimum academic performance need only advise that student with respect to such deficiencies in any form. All that is required is that the student be made aware prior to termination of his failure or impending failure to meet those standards."

In the case at bar the court in its opinion referred to communications to the Respondent which pointed out her deficiencies, thus there is no question but what Respondent knew of the deficiencies for at least one year prior to her dismissal. Thus, the facts show that Petitioners had complied with even the more stringent requirements of the Tenth Circuit Court of Appeals.

The opinion of the Eighth Circuit Court of Appeals in the case at bar is in direct conflict with United States District Court opinions in *Connelly v. University of Vermont*, 244 F. Supp. 156 (D. Vt. 1965), *Depperman v. University of Kentucky*,

371 F. Supp. 73 (E.D. Ky. 1974) and *Keys v. Sawyer*, 353 F. Supp. 936 (S.D. Tex. 1973). These United States District Court opinions have heretofore been the guiding light for public institutions of higher education on the issue here involved.

Prior to the decision of the Eighth Circuit Court of Appeals the courts had not injected themselves into the realm of academic evaluation of students, but had left such evaluations and determinations to professional educators who have the expertise and knowledge to evaluate a student's academic performance. In the *Greenhill* decision, supra, at page 9 the Eighth Circuit in not requiring the school to have a hearing on the student's academic performance or evaluation stated:

> "A graduate or professional school is, after all, the best judge of its student's academic performance and their ability to master the required curriculum."

The present opinion in the case at bar is a drastic change in the law applied to higher education and presents far reaching implications. As stated by Chief Judge Gibson of the Eighth Circuit Court of Appeals:

> "My main concern with this decision is that it impermissively injects the courts into the academic environment of colleges and professional schools to an unacceptable degree. Educational institutions are much more qualified and better positioned to promulgate and enforce procedures which regulate academic performance. Dismissals due to academic deficiencies are not uncommon and schools may be expected to review the files of a number of students during the course of an academic year to determine whether expulsion is warranted. The present case seems to require the schools to give all such students formal notification of their deficiencies and an opportunity to respond before dismissal, regardless of how egregious the deficiency might be. Such a rule is likely to foment future litigation and subject educational institutions to unnecessary monitoring

and to possible monetary judgments. This decision is not, in my opinion, in accord with existing principles of constitutional law and fails to give sufficient deference to the perspective and unique position of school administrators."

CONCLUSION

It is respectfully requested that the Supreme Court grant certiorari in this case.

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APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 75-1949

Charlotte Horowitz, Appellant, v. Board of Curators of the University of Missouri, et al., Appellees.	Appeal from the United States District Court for the Western District of Missouri.

Submitted: June 15, 1976

Filed: July 16, 1976

Before HEANEY, ROSS and STEPHENSON, Circuit Judges.

ROSS, Circuit Judge.

Charlotte Horowitz has brought this action under 42 U.S.C. § 1983 challenging her dismissal from the University of Missouri-Kansas City (UMKC) School of Medicine in July 1973. The defendants are the governing body of the institution and certain officials of the medical school. The case was tried without a jury and judgment was for the defendants, from which Horowitz now appeals. We reverse the district court judgment.

The facts are not seriously in dispute. The UMKC Medical School admitted its first students in August 1971; Horowitz was admitted at that time as an advanced standing student. She has a Bachelor's degree in chemistry from Barnard College and a Master's in psychology from Columbia University. She studied pharmacology at Duke for one year, taking the same curriculum as the first year medical students there. She began as a sopho-

more at the Women's Medical College of Pennsylvania but withdrew in good standing because of illness her first semester. She also did graduate study and worked in the field of psychopharmacology at the National Institute of Health in Bethesda, Maryland for five years. She scored above the 99th percentile on the Graduate Record Examination in Verbal Aptitude, Quantitative Aptitude, Advanced Psychology and Advanced Chemistry. Her scores on the Medical College Admissions Test were also extremely high, with scores in the 99th percentile in the General Information and Science categories. She received excellent recommendations from those with whom she had worked at the National Institute of Health and educators.

The UMKC Medical School's curriculum is intended to educate its students to become competent practicing physicians. Therefore, the school considers that a student must become proficient in clinical skills in order to earn an M.D. degree. Both Horowitz and the University knew at the time of her entrance, however, that she intended to become a psychiatrist and teach or do research.

The policies and regulations of the school do not state the requirements of graduation in terms of a certain number of courses which must be completed. During the last two years of medical education at UMKC a student is required to pursue studies in rotational units which deal with various areas of medicine: e.g. Pathology-Anatomy, Psychiatry, Obstetrics-Gynecology. These units generally included clinical responsibilities as well as academic study. Horowitz received credit for all these rotations except Emergency Room, her last rotation, which was not completed until after it was determined she would not graduate.[1] Her academic (as opposed to practical) performance cer-

[1] The University draws a distinction between receiving credit and satisfactorily completing a course, and contends that Horowitz did not satisfactorily complete courses besides Emergency Room. It does not appear that this distinction was communicated to Horowitz or the other students, however.

tainly gave no cause for complaint. She scored first in the school on Part I of the National Board Examination for medical students and second on Part II. She ranked fourth in her class in quarterly exams in February 1973, and second in the May 1973 exams. In the latter examination she was either first or second in 14 of the 30 categories.

Although she received credit in all rotational units except Emergency Room and her docent, the faculty member who had the closest contact with her, regarded her performance as outstanding throughout her first year,[2] other faculty members felt her clinical performance was deficient. This first came to light in the spring of 1972 when faculty members in the Pediatrics course criticized her lack of patient rapport and "expertise in coming to the fundamentals of the clinical problem," erratic attendance, and poor personal hygiene. These criticisms were brought to Horowitz's attention by her docent, although she was not shown her formal course evaluations.

Toward the end of her first year at the school, Horowitz's record was reviewed by the Council on Evaluation, a body of students and faculty which recommended to the Dean that she not be advanced to Year VI, the final year of the medical school. However, in a letter dated July 5, 1972, which confirmed an earlier conversation, the Dean told Horowitz that she was being advanced to Year VI, but was on probation. The letter pointed out her deficiencies as follows:

> Your acquisition of information is good. Your relationship with others has not been good and represents a major

[2] The docent's role was compared by UMKC to that of an ombudsman. During a student's academic career he or she would have more frequent and closer contact with the docent than any other faculty member. Horowitz's docent testified that he would have recommended that she be allowed to graduate in the Spring of 1973, and be given a residency, and in fact he had so recommended in June 1972.

deficiency. You need to improve your relationship with others rapidly and substantially. This involves keeping to established schedules; meeting all clinical responsibilities on time and gracefully; attending carefully to personal appearance, including hand washing and grooming; participating appropriately in the activities of the School; and directing criticisms and suggestions maturely to your Docent and to the faculty member who is in charge of a curriculum block as you may have criticisms and suggestions.

The letter also stated that noncompliance with certain standards of conduct "is incompatible with continued progress and graduation." After she was placed on probation, Horowitz was counseled frequently by her docent, the Dean and other faculty members until her ultimate dismissal.

In November of 1972 the University's Provost for the Health Sciences promulgated changes in the procedures for deciding questions of students' academic standing. The Council on Evaluation thereafter made recommendations to the Coordinating Committee, which consisted of faculty members. The Coordinating Committee had veto power over the Council's recommendations, and the Dean had veto power over recommendations of the Coordinating Committee. Provision was made for students' personal appearances before the Council upon its request if that body felt it had inadequate information. It was also provided that a student could be given additional practical and oral examinations if the Council needed to resolve questions of competence as a physician. On December 26, 1972, the Council on Evaluation reconsidered Horowitz's status and recommended that she not be allowed to graduate on schedule in June 1973. This recommendation was accepted by the Coordinating Committee. The Dean approved this recommendation and on February 7, 1973, he wrote a letter to Horowitz reviewing a conference with her, held January 26. The Dean's letter stated that she had not made sufficient progress as outlined in the

July 5 letter and was being continued on probation. She was informed that she would not be able to graduate as scheduled and that she would have to improve markedly in the areas of clinical competence, peer and patient relations, personal hygiene and ability to accept criticism. If she did not make the improvement considered necessary by the Council on Evaluation, she would not be able to continue at the medical school after May. She was told that she could request a set of oral and practical examinations as an "appeal" of the decision not to graduate her in the spring of 1973. Horowitz initiated such a request.

Since no such proceeding had ever been requested and no procedures had been set up, the school had to create a procedure to be followed in Horowitz's case. It was arranged that she would be examined by seven experienced physicians on the faculty, none of whom had appreciable previous contact with Horowitz. They would evaluate her clinical abilities in the areas of pediatrics, pathology and anatomy, general medicine, and obstetrics and gynecology. The Dean informed the seven physicians by letter and a meeting that they were to make one of three recommendations: a) graduation on schedule; b) continued probation and reassessment of her status in May 1973; c) dismissal from the medical school. The option of recommending additional study after May 1973 without dismissal was not given to them. A majority opinion of the seven doctors was to be determined and submitted to the Council on Evaluation. The examinations were conducted and the doctors submitted their reports. Two recommended that Horowitz graduate on schedule, two recommended that she continue on probation, and two recommended that she be dropped from school. One believed she was not qualified to graduate at that time, but expressed no further opinion. Although there was no clear majority opinion the panel was not called together as the procedures contemplated. Their written individual recommendations were submitted to the Council on Evaluation.

On May 1, 1973, after considering the panel's reports, the Council reaffirmed its opinion that Horowitz should not be allowed to graduate in June, and the Coordinating Committee accepted this recommendation. The Dean also approved, and on May 7 this decision was communicated to Ms. Horowitz. At that time she was told that a decision would be made soon on whether she would be allowed to remain in school. Horowitz wrote a letter to the Dean requesting that she be allowed to remain in school for a short time to correct her deficiencies, but this letter was not answered.

On May 28, 1973, the Council on Evaluation met again to reconsider Horowitz's status in light of her performance in courses taken that spring, and it was decided that she should be dropped from the school. On June 4 the Coordinating Committee accepted this recommendation and Horowitz was notified by the Dean that she was no longer in school on July 3. Horowitz sought reversal of this decision from the Provost for the Health Sciences, who denied her request.

Horowitz was never given a chance to appear before the Council on Evaluation, the Coordinating Committee or the Dean, for a hearing during the dismissal procedure, nor was she informed of the time or place of any of their meetings. Neither was she given copies of the formal evaluations or other evidence which the Council and the Committee considered.

The evidence reveals that Horowitz rejected suggestions by the medical school faculty that she alter her professional plans and seek a Ph.D. rather than a medical degree because a Ph.D. would not allow her to conduct the experimentation in psychopharmacology that was her goal. It was stipulated that she was offered employment at the University of North Carolina, conditional upon her obtaining the degree of Doctor of Medicine, and she testified that she had accepted that offer in November 1972. It was also uncontroverted that Horowitz's dismissal from medical school will make it difficult or impossible for her

to obtain employment in a medically related field or to enter another medical school.[3]

The district court, in holding for defendants, relied on "the immunity accorded [educational authorities] in academic matters . . .", absent a showing of bad faith or arbitrary and capricious action. We are cognizant that some decisions recognize a distinction between expulsions for misconduct and academic failure. *See, e.g., Brookins v. Bonnell*, 362 F.Supp. 379, 382 (E.D. Pa. 1973). We express no opinion on the validity of that distinction under other circumstances. However, our decision in *Greenhill v. Bailey*, 519 F.2d 5, 8-9 (8th Cir. 1975) acknowledges "that the dictates of due process, long recognized as applicable to disciplinary expulsions . . . may apply in other cases as well, where the particular circumstances meet the criteria articulated by the Supreme Court in *Board of Regents v. Roth*, [408 U.S. 564 (1972)], and *Perry v. Sindermann* [408 U.S. 593 (1972)]." In *Board of Regents v. Roth*,

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[3] Dr. Cohen, who had 30 years of experience in hiring M.D.'s, Ph.D.'s and others for medical research in various institutions testified:

> Yes, I would be very much concerned about an individual who was dismissed from a medical school, or, for that matter, from any graduate school. This to me is a very serious matter and I would have to look very carefully into that person's background, record and so forth. And if there were two individuals that, say, that person or someone else were applying and otherwise would have equal qualifications, roughly, I would lean heavily to the other person who was not dismissed from a graduate school.
>
> * * * * * * *
>
> Yes, I think it would be a significant black mark against that person's name, I think it would stigmatize that individual, I think that person would probably be—well, would have great difficulty to get into another medical school, if at all.

Transcript at 25-26. We note that UMKC's own application forms require that a student fully explain the reasons they were required to leave "any college, graduate or professional school . . . because of deficiencies in either conduct or scholarship." Plaintiff's Exhibit 10. We believe the evidence in this case makes it factually distinguishable from those in which a damaging stigma was not proved or was inadequately alleged. *E.g. Bishop v. Wood*, No. 74-1003 (U.S., June 10, 1976); *Board of Regents v. Roth*, 408 U.S. 564, 573-574 (1972).

supra, 408 U.S. at 573, the Court recognized that action of the state which "imposed . . . a stigma or other disability that foreclosed . . . freedom to take advantage of other employment opportunities" was a deprivation of liberty which could not be accomplished without notice and a hearing. In *Greenhill, supra*, 519 F.2d at 8, we found such stigmatization where a medical student's expulsion for academic failure on the basis of lack of intellectual ability or inadequate preparation effectively foreclosed him from pursuing a medical education, because of the inherent suggestion that he was unfit to study medicine.

The unrefuted evidence here establishes that Horowitz has been stigmatized by her dismissal in such a way that she will be unable to continue her medical education, and her chances of returning to employment in a medically related field are severely damaged. The dismissal was effected without the hearing required by the fourteenth amendment.[4]

We reverse and remand to the district court with instructions to order defendants to provide Horowitz with a hearing before the decision making body or bodies, at which she shall have an opportunity to rebut the evidence being relied upon for her dismissal and accorded all other procedural due process rights.[5]

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[4] The parties agree that the appeal procedure, involving tests administered by the panel of seven doctors, related only to the decision not to graduate Horowitz, and not to the decision to expel her. Nevertheless, we doubt that this procedure would satisfy the requirement of due process, since the panel itself was only an examiniig board without any power except the power to make recommendations to another body which also had only that same power.

[5] Because of our disposition of this case we do not reach the substantive due process ground advanced by Horowitz.

United States Court of Appeals
For the Eighth Circuit

No. 75-1949

Charlotte Horowitz, Appellant, v. Board of Curators of the University of Missouri, et al., Appellees.	Appeal from the United States District Court for the Western District of Missouri

Filed: September 2, 1976

ORDER DENYING PETITION FOR REHEARING EN BANC

The petition for rehearing en banc is denied by a vote of 5 to 3. Chief Judge Gibson, joined by Judges Webster and Henley, would grant the rehearing en banc for the following reasons.

My main concern with this decision is that it impermissively injects the courts into the academic environment of colleges and professional schools to an unacceptable degree. Educational institutions are much more qualified and better positioned to promulgate and enforce procedures which regulate academic performance. Dismissals due to academic deficiencies are not uncommon and schools may be expected to review the files of a number of students during the course of an academic year to determine whether expulsion is warranted. The present case seems to require the schools to give all such students formal notification of their deficiencies and an opportunity to respond before dismissal, regardless of how egregious the deficiency

might be. Such a rule is likely to foment future litigation and subject educational institutions to unnecessary monitoring and to possible monetary judgments. This decision is not, in my opinion, in accord with existing principles of constitutional law and fails to give sufficient deference to the perspective and unique position of school administrators.

The dismissal of Horowitz from the U.M.K.C. School of Medicine did not implicate any liberty interest which would mandate the invocation of procedural due process guarantees. The dismissal did not stigmatize Horowitz in a constitutional sense. The Supreme Court recently ruled that an individual's good name, reputation or integrity is not impaired when he is dismissed from employment for false reasons unless there has been a public disclosure of the reasons for discharge. *Bishop v. Wood*, 44 U.S. L.W. 4820, 4822 (U.S. June 10, 1976). Absent such public disclosure, there is no deprivation of a liberty interest. In the present case, the reasons for Horowitz's dismissal were not released to the public but were communicated to her directly by school officials.

Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975), is factually distinguishable from the present case and, thus, not controlling. In *Greenhill*, the student was dismissed because he allegedly lacked the intellectual ability to continue in medical school. This denigrating information was disseminated outside of the medical school by school officials when notification of the student's dismissal was forwarded to the Liaison Committee of the Association of American Medical Colleges. No such public disclosure took place in this case. In the *Greenhill* opinion, the court noted that the school's action disparaged only plaintiff's intellectual capacity as opposed to his performance in school. Here, it was Horowitz's deficient performance in the clinical program which provided the sole basis for her dismissal; there was no reference to her intellectual abilities.

Even if due process rights were involved in this case, I believe Horowitz received all the process that was called for under the circumstances. She was informed several times of her inadequacies in the clinical program. She was counseled by the Dean and faculty members. She submitted to a series of oral and practical examinations before a panel of seven doctors and only two doctors were of the opinion that she was qualified to graduate on schedule. Her deficiencies remained uncorrected and she was dismissed from school. Horowitz clearly was given sufficient notice of her weaknesses and she was informed that dismissal might result if corrective measures were not successfully pursued. This notice and the opportunity over the course of a year to correct her deficiencies were sufficient for due process purposes.

Unless it can be shown that a student's dismissal was actually motivated by a desire to limit the student's constitutionally protected rights, *see Bishop v. Wood*, 44 U.S.L.W. at 4823, courts should stay their hands and permit schools to pursue their institutional policies without judicial interference.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

In the United States District Court for the
Western District of Missouri
Western Division

Civil Action No. 74CV47-W-3

Charlotte M. Horowitz,
Plaintiff,

vs.

The Curators of the University of Missouri
University of Missouri, Columbia, Missouri,

William H. Billings, Irvin Fane, Pleasant R. Smith, William C. Myers, Jr., Mrs. William C. Tucker, John Sam Williamson, Robert G. Brady, Theodore D. McNeal, G. Fred Kling, Jr. [members of the Board of Curators of the University of Missouri, individually and in their official capacities.]

Richardson K. Noback, M.D., Dean of School of Medicine, University of Missouri-Kansas City, Kansas City, Missouri
E. Grey Dimond, M.D., Provost-Health Sciences, University of Missouri-Kansas City, Kansas City, Missouri

and

ALL other persons succeeding to or acting in the offices or official capacities of the above-named, and their agents, subordinates, and employees,
Defendants.

Juergens,* Senior Judge

MEMORANDUM AND ORDER

(Filed November 14, 1975)

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* United States Senior District Judge William G. Juergens of the Eastern District of Illinois is sitting by assignment.

This civil rights action was tried to the Court without a jury on July 16 and 17, 1975.

The complaint alleges that:

> Jurisdiction exists under the provisions of the Civil Rights Act, 42 U.S.C. 1983 and 28 U.S.C. 2201, and seeks declaratory judgment, damages, injunctive and other relief to redress the deprivation by defendants, their agents, employees and others acting in concert with them, which acts were under color of state law, statute, ordinance, regulation, custom or usage of the plaintiff's rights, privileges and immunities secured by the Constitution of the United States. Jurisdiction rests upon 28 U.S.C. 1343(3), 1343(4) and 1331(a). Plaintiff has been and, unless relief is granted in this case, will continue to be deprived by the defendants of due process of law.

Plaintiff, Charlotte M. Horowitz, is a citizen of the State of New York and defendants are citizens of the State of Missouri. The amount in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

Plaintiff is a citizen of the United States and of the State of New York and was admitted to the School of Medicine, University of Missouri-Kansas City (U.M.K.C.) with advanced standing on August 30, 1971.

Defendant, the Curators of the Univeristy of Missouri, is a duly incorporated and created body politic pursuant to Mo. Rev. Stat. 172.020, and is authorized by the Missouri legislature and has powers to determine admissibility of students, appoint and assign all duties and responsibilities to faculty and employees of the University, and confer all degrees.

Defendant Noback is Dean of the University.

Defendant Dimond is Provost-Health Sciences, U.M.K.C.
The complaint also alleges that:

The plaintiff has consistently performed outstandingly during her academic career. Upon application to the school, plaintiff had graduated from Barnard College, had earned an A.M. degree from Columbia University in New York, had studied at Duke University in pharmacology, and had been at the National Institute of Health for approximately five years doing work in psycho-pharamacology, where her scholastic achievements were superior. Enclosed with the application to U.M.K.C. for admission was a personal statement and autobiography, indicating that her ultimate career goal was a position in academic psycho-pharmacology. Plaintiff's scores on Graduate Record Exams were in the top one percent of all scores; her Medical College Admissions Text scores were above the ninetieth percentile in aptitude, and in the ninety-ninth percentile in achievement.

It was with full knowledge of plaintiff's intent to pursue an academic medical career that she was accepted with advanced standing by defendants into the U.M.K.C. School of Medicine at the time the six-year academic program was first being implemented.

On July 5, 1972, defendant Noback, M.D., Dean, sent a letter to plaintiff, relating a discussion between them on the previous Saturday. In the letter it was stated that the the Council on Evaluation had completed a review of Advanced Standing students, including plaintiff. The letter further stated:

> "Your acquisition of information is good, but your relationship with others had (sic) not been good and represents a major deficiency. You need to improve your relationship with others rapidly and substantially. This involves: keeping to established schedules; meeting all clinical responsibilities on time and gracefully; attending carefully to personal appearance including hand washing and grooming; participating

> appropriately in the activities of the School; and directing criticisms and suggestions to your Docent and to the faculty member who is in charge of a curriculum block . . ."

The letter further informed plaintiff she was on probation.

On January 29, 1973, plaintiff received a letter from Dr. Morris A. Lipton, Professor of Psychiatry and Chairman of the Department of Psychitary, and Dr. Arthur J. Prange, Jr., Professor of Psychiatry and Director of Research Development, at the University of North Carolina at Chapel Hill, offering plaintiff a position as Research Associate in the Department of Psychiatry. The position was initially to begin July 1, 1973, and later extended to September 1, 1973. Her salary was to be $10,500.00 plus fringe benefits. The work would consist mainly of assisting doctors in analyzing data and preparing manuscripts. The offer was contingent upon plaintiff's obtaining the degree of Doctor of Medicine.

In a letter of February 7, 1973, after a meeting with plaintiff, Dr. Smull, Dr. W. Sirridge, and defendant Noback, Dr. Noback reiterated that plaintiff's progress had been reviewed by the Council on Evaluation, which made recommendations to the Coordinating Committee, which the latter accepted. Plaintiff was told in the letter:

> ". . . your progress has not been sufficient to show the improvements called for in my letter to you of July 5, 1972; for these reasons, you are being continued on probation; it is not possible for you to be a candidate for graduation in May of this year; and you must make a very marked and very substantial improvement in several areas. These are: clinical competence, peer and patient relations, personal hygiene, and ability to accept criticism."

The plaintiff elected to exercise the option to request a special appeal of the Coordinating Committee's decision and received a letter on March 15, 1973, from Dr. Noback, stating that he had contacted several experienced physicians, whom plaintiff should contact and meet with in a clinical setting, who would evaluate plaintiff as to her "mastery of relevant concepts, knowledge, skills, and competence to function as a physician." After these sessions, each physician submitted a written statement of his recommendation and his reasons therefor. These recommendations went to the Council on Evaluation, which in turn made a recommendation to the Coordinating Committee.

The results of the seven physicians asked to examine and evaluate plaintiff's skills and their recommendations are set out in the complaint.

On the examinations of the National Board of Medical Examiners, plaintiff achieved the highest score among all members of her class on both Part 1 and Part 2. On the psychiatry section, plaintiff scored 795 out of the possible 800, one of the highest scores in the United States.

In a letter, dated August 10, 1972, Dr. William T. Sirridge, Senior Docent and Professor of Medicine at U.M.K.C., stated that plaintiff "has the highest academic standing in the class."

During plaintiff's two years at the medical school, she received only one "no credit" in Emergency Room of all twenty-one clinical and academic courses recorded on her transcript. The grade of "no credit" was recorded after plaintiff was denied the right to graduate in May of 1973.

Between the time plaintiff was put on probation, July 5, 1972, for deficiency in interpersonal relations and the time the Council on Evaluation determined plaintiff should remain on probation (February 7, 1973), plaintiff took two courses: namely, psychiatry and medicine. The psychiatry

evaluation stated that plaintiff felt accepted by people with whom she worked, and the medicine evaluation rated her satisfactory in peer relationships and patient rapport.

On July 6, 1973, plaintiff received a letter from Dr. Noback, stating that the Council on Evaluation had recommended that plaintiff not be allowed to continue in school after the end of May. This decision was subsequently accepted by the Coordinating Committee and Dr. Noback. The letter further concluded that the decision of the school was that plaintiff was no longer a student.

The complaint further alleges that:

The defendants, Curators and others acting under color of law, have deprived plaintiff of rights, privileges and immunities secured under the Constitution and have exercised such powers so as to result in the violation of plaintiff's civil rights.

Defendants have deprived plaintiff of the right to pursue the lawful calling to practice medicine, contingent upon her right to graduate from the University, by an act having no reasonable relation to any proper educational and governmental purpose, which is arbitrary, capricious, and a bad faith exercise of governmental power, thereby violating the due process and equal protection clauses of the Fourteenth Amendment.

Defendants have deprived plaintiff of the right to pursue her lawful calling to practice medicine, contingent upon her right to graduate from the University, by actions such that plaintiff was not given a hearing in which she was allowed to present her position, explanation, evidence, and to produce witnesses in her behalf. Plaintiff's dismissal was not supported by substantial evidence.

Having made an offer to plaintiff accepting her for admission to the School of Medicine, the plaintiff having accepted this offer by registering, a contractual relation-

ship arose between the Curators and plaintiff. Plaintiff agreed to pay tuition and fees and the school agreed to provide instruction and subsequently a degree, if the student remained in good standing academically and abided by the school's rules and regulations. By dismissing plaintiff arbitrarily, the defendants breached their contract and are liable.

The Curators of the University, by dismissing the plaintiff through the above procedures, have unreasonably imposed dismissal and refusal to graduate plaintiff for a cause inconsistent with its functions as a university and in a manner inconsistent with scholarly integrity and fair process.

Plaintiff prays for an injunction, enjoining defendants from dismissing plaintiff from the University of Missouri-Kansas City School of Medicine or alternatively that defendants be ordered to reinstate plaintiff as a student in good standing, to graduate plaintiff, and to enjoin defendants from engaging in policies and practices stated above; that plaintiff be awarded compensatory damage and exemplary and punitive damages in the amount of Ten Thousand Dollars due to the wanton, reckless, malicious and oppressive nature of defendants' actions.

The only issues of fact which are not admitted and remain to be litigated upon the trial are whether the graduating and evaluating system of the Medical School was applied fairly and reasonably to plaintiff; whether plaintiff satisfied all applicable requirements of the Medical School to graduate from the Medical School in June of 1973; whether the plaintiff's past performances in Medical School warranted her being continued in the Medical School beyond June, 1973; whether the progress and status of the plaintiff at the Medical School was evaluated in a manner similar to and consistent with the evaluation of other similarly situated students; whether plaintiff, because of her religion, was evaluated in a manner different than the

evaluation of other students; whether plaintiff, because of her physical appearance, was evaluated in a manner different than the evaluation of other students; whether plaintiff paid her tuition and all associated expenses of her medical expenses in a timely manner upon receipt of statements therefor; whether the education of medical specialists is not among the primary goals of the Medical School; whether plaintiff has suffered damages and, if so, in what amount; whether the actions of defendants in evaluating plaintiff's academic performance, denying graduating and dismissing plaintiff from medical school, were done in good faith.

In addition to the above questions of fact for consideration, plaintiff's counsel submits that the following are also issues of fact in the case: Whether prior to plaintiff's enrollment and during her attendance at the Medical School, plaintiff understood that a requirement to graduate with a degree medical doctor was that she acquire at least a degree of medical skills required by the average medical school in the country; whether prior to May 18, 1973, plaintiff was advised by defendants or their agents that her performance in pediatrics was so deficient that it would be relied upon in part to deny her promotion or graduation or in any way impede her progress through medical school; whether plaintiff has a reading knowledge of French, Russian and German and has experience in medical writing and computer programming.

During the course of the trial, the evidence totally failed to show that any member of the faculty at the U.M.K.C. School of Medicine or any of her docents to which she was assigned during her attendance at the University, or her chief docent, were prejudiced in any way against plaintiff because of her sex, race, religion or appearance. To the contrary, her chief docent, namely, Dr. William Sirridge, testified that if there was any prejudice on his part, it was in favor of the plaintiff rather than unfavorable; that he had spent more time with plaintiff, while

acting as her docent, than he had with any of the other students for which he was docent; that he did everything he possibly could to assist her in obtaining the necessary medical skills to graduate with a M.D. degree; that he spent many hours with her, discussing the problems she was having in school generally. This testimony was further bolstered by Marjorie Sirridge, who was also a docent and professor at the University and who was the wife of Dr. William T. Sirridge.

Dr. William Sirridge testified that plaintiff was always the last to enter a room for classes, was always the last in line in making rounds; that after plaintiff received the letter from Dean Noback on July 5, 1972, he discussed in detail with the plaintiff the need for her keeping to established schedules, meeting all the clinical responsibilities on time and gracefully, and emphasized she must pay more attention to her physical appearance, including her cleanliness and grooming, and that it was necessary for her to participate in all the activities at the school with regard to her classes; that she must learn to accept criticism for what it was, in that it was meant to be of assistance to her and was not meant in a derogatory fashion. Her docent, Dr. William Sirridge, counseled with her on many occasions in an attempt to encourage her to meet all of the required medical skills so that she might graduate on schedule. He further testified that plaintiff would never admit an error; that "it was always other persons fault, not hers"; he encouraged her constantly to keep herself neat and clean and cautioned her on several occasions about the condition of her white coat and its cleanliness, especially when seeing patients, but that plaintiff was unkempt in her personal appearance, about which he cautioned her many times, perhaps a hundred times. Plaintiff was constantly criticizing the school curriculum. He sought to emphasize to her that in order to receive a M.D. degree, it was necessary for her to obtain the necessary medical skills. He attended a meeting of the Council concerning plaintiff at the first evaluation with the effect that she was retained in school. At the second evaluation,

he appeared before the Committee and asked that plaintiff be kept in school. He conferred with the Committee for at least three hours, which resulted in plaintiff's being retained in school. He explained to plaintiff that pediatrics is a necessary part of the program to graduate from the school; that she would have to give more attention to the pediatrics program if she hoped to graduate. He emphasized that plaintiff's problem was that she thought she could learn to be a medical doctor by reading books, and he advised her the clinical skills were equally as important for obtaining the M.D. degree. He further testified that plaintiff cannot perform many of the necessary basic skills required of a practicing physician; that notwithstanding his calling plaintiff's deficiencies to her attention, she did not correct them and he had no knowledge of anyone in the school who was prejudiced against plaintiff because of her sex or her religion; that once a student graduates from the school, that person is then free to practice medicine generally.

Dr. Richardson K. Noback, Dean, U.M.K.C. School of Medicine, also a Professor of Medicine, testified that he counseled with plaintiff on several occasions prior to meeting with the Council and discussing plaintiff's academic status; that on February 7, 1973, after meeting with plaintiff, Dr. Smull, and Dr. W. Sirridge, he wrote a letter to the plaintiff, informing her that she had failed to make sufficient improvement called for in his prior letter of July 5, 1972, when she was placed on probation; that it would not be possible for her to graduate in May, setting forth the reasons for the continued probation and the areas in which she needed to make marked improvements.

The evidence also established that following receipt of the February 7 letter from the Dean, plaintiff elected to exercise the option to request a special appeal of the Coordinating Committee decision. After receiving this request, the Dean then contacted seven experienced physicians, informing them that she would contact them for evaluation and that he wished the

doctors to examine her in clinical setting to evaluate her as to her "mastery of relevant concepts, knowledge, skills and competence to function as a physician." Dr. Noback then advised plaintiff by letter as follows:

March 15, 1973

Miss Charlotte Horowitz
University of Missouri-Kansas City
School of Medicine
Kansas City, Missouri

Dear Miss Horowitz:

In response to your recent request and in keeping with the Academic Plan I have asked seven experienced physicians to serve as a panel to provide a careful, detailed, and thorough assessment of your abilities at this time. The School is asking each of these physicians to conduct such an impartial, careful, and searching assessment of your present competence. For the clinicians this will involve spending several hours with you as you examine one or more patients with each of these physicians and as you discuss the cause, manifestations, pathophysiology, course, and management of the problems of the patient or patients whom you will see. The pathologists may use clinical protocols, slides, and other laboratory items to lead into similar discussions.

The following list contains the names of these physicians, the general topic in the curriculum about which we are asking them to evaluate your performance, and their office telephone numbers.

Dr. Richard D. Blim	Pediatrics	561-8100
Dr. Hilliard Cohen	Pathology / Anatomy	861-4700 X327
Dr. James E. Crockett	General Medicine	931-1884
Dr. Mark Dodge	General Medicine	531-0552

Dr. Raymond W. Latham	Pediatrics	561-6060
Dr. Robert L. Newman	Obstetrics and Gynecology	932-2047
Dr. Mark D. Ost	Pathology / Anatomy	361-3500 X345

I am asking each physician to observe you as you go through those steps and procedures appropriate to a Year 6 student and evaluate the extent of your mastery of relevant concepts, knowledge, skills, and competence to function as a physician. I am asking them to use such steps as observing you as you evaluate a patient by taking the history, carrying out the physical examination, collecting and evaluating other data, formulating a problem list, and developing a management plan. I am asking them to discuss with you the patient's situation and illness to determine the extent of your information as well as other aspects of clinical competence. This may involve discussing the cause, manifestations pathophysiology, course and management of the problems of one or more patients.

At this point I am asking you personally to make contact beginning on Monday, March 19 with each physician on the list to arrange a satisfactory time for this set of oral and practical examinations. The physician's office or his hospital may provide the setting and the patients to be examined. If the physician prefers, the setting may be at one of our affiliated hospitals. You should plan on several hours to a half-day for each of these sessions. Please keep your Docent informed.

At the end of your experience with each of these physicians the School is asking the physician for a careful written statement of his recommendations and the reasons for his recommendations. The recommendations of your examining panel will then go to the Council on Evaluation. That Council will make its recommendations to the Coordinating Committee.

In this way the School has established a careful, deliberate, and impartial process to provide recommendations about your status at this time. On a personal note, I would like to encourage you to look forward to these clinical sessions with experienced and able physicians.

Richardson K. Noback, M.D.
Dean

RKN:j
cc: Dr. William T. Sirridge.

Of the seven doctors contacted, the evidence established the following:

Dr. Newman recommended as follows:

"My recommendation would be that the student not be permitted to graduate at the end of May 1973, that she remain on probation to the end of May 1973 and her performance can be reassessed at that time depending on the evaluation as to whether she should be totally dropped from the school."

Dr. Dodge recommended that he would favor giving plaintiff a M.D. degree, but that she would not qualify to intern at St. Luke's where he practiced.

Dr. Latham stated that plaintiff did not compare favorably in clinical performance with other senior students with which he had worked as an instructor in the pediatric clinics; that she would have to improve a great deal in examination methods and completeness in study of patient problems before she would be a useful member of a hospital staff. He further stated: "I am certain that she is not presently qualified to receive a medical degree but would hesitate to give an opinion about other alternatives."

Dr. Blim stated that Miss Horowitz had been given two patients from Emergency at Mercy Hospital; that she proceeded

with history taking, examination and eventual discussion of the current disease process and discussion of treatment; that as a result of approximately 2½ hours having been spent with Miss Horowitz in a clinical setting, he found she demonstrated substantial deficiencies; that she appeared to have no concept of proper history taking, even lacking the ability to ascertain the chief complaint, and even more difficulty in obtaining any history of present illness, and has no concept or ability to perform a physical exam; that she has not adequately mastered the ability to develop a problem list or differential diagnosis and, of course, cannot develop any reasonable suggestions for further testing and/or thearpy. It was Dr. Blim's firm recommendation that she be dropped from the medical school.

Dr. Hilliard Cohen, Pathologist from the Veterans Administration Hospital, concluded that plaintiff had prepared herself well and was performing very satisfactorily; that she should continue on the curriculum schedule, and recommended that she be graduated at the end of May, 1973.

Dr. Ost recommended that plaintiff should not be graduated from medical school in May and stated he further doubted whether any additional remedial work would be adequate to solve her basic problems which seemed to be ones of personality and inability to correlate information. It was his recommendation that the student be dropped from the medical school.

Dr. Crockett gave the opinion that the plaintiff did not at the time of the interview possess the necessary skills and knowledge to perform as a safe physician and recommended that she be required to continue in the School of Medicine on probationary status for one more year.

It must be noted that only two of the doctors recommended she be graduated, and one of those two doctors, although recommending granting the degree, stated she would not qualify to intern at the hospital where he worked. Five of the seven doc-

tors recommended that she not graduate in 1973. Two of the five recommending that she not graduate recommended an additional period of probation. Two of the five recommending no graduation also recommended that she be dropped from school. One of the five recommending no graduation gave no opinion as to alternatives, other than she was not qualified for a degree. These reports were returned to the Dean and were considered, together with all the other findings of the staff and faculty of the Medical School, by the Council on Evaluation and the Coordinating Committee. In July of 1973 the Council on Evaluation recommended that plaintiff not graduate and that she not continue in the school after the end of May. This evaluation was presented to the Coordinating Committee, which agreed, and the recommendation was accepted by the Dean. Plaintiff was then notified she was no longer a student.

During the course of her attendance at the school, plaintiff wrote some rather scathing letters to her docent in which she criticized severely various members of the staff, both with regard to their conduct and with regard to their ability to perform their various functions. In one of the letters she stated: "The outpatient service was a waste of time and I didn't care for it." She further stated:

> "This was not a learning experience, but an opportunity for the hospital to obtain free labor. I could have learned more medicine by doing half the number of examinations and by having the afternoons free for reading the textbook."

In this same manner she evaluates some of the doctors involved in the outpatient clinic—referring to one of the doctors, namely, Dr. Katherine Smith, as "a bitch and a bigot." In the entire letter she is critical of practically the entire curriculum, the method in which the school was being conducted, the competency of the doctors, several of whom she was of the opinion

were totally incompetent. In referring to Dr. Wenner, one of the docents in pediatrics, she stated as follows:

> "To say the least, I did not care for Dr. Wenner. He is a highly competitive individual who does not like bright students. In fairness to him, he did spend a large amount of time teaching microbiology to us. He knows a great deal about microbiology and likes to show off his knowledge. He is, however, a frustrated pseudointellectual who becomes upset when the Real McCoy shows up."

The evidence further disclosed that the plaintiff was made aware of the requirements that she qualify in clinical skills in order to obtain the M.D. degree.

Statistics showed that at U.M.K.C. Medical School the classes consisted of 20% women in 1971, 20% women in 1972-1973, and 30% women in 1973-1974.

One of the doctors whom plaintiff charges was biased against her because of her religion was Dr. Katherine W. Smith, who testified she had taught plaintiff in the clinic but she does not recall slamming the door in her face; that she had talked to plaintiff about her cleanliness and hygiene and on at least one occasion offered her coat to plaintiff because plaintiff's white coat she was wearing was so very dirty; that she advised plaintiff that she should wash her hands before examining a patient and again after the patient was examined. Plaintiff testified she felt this was a bit much.

In the landmark case of Dixon v. Alabama State Board of Education, 294 F.2d 150 (5 Cir. 1961), students were expelled apparently for engaging in lunch-counter demonstrations. The court held that "the rudiments of an adversary proceeding must be afforded" but stated that on the other hand it was established that "due process" does not require notice and a hearing for a student expelled for scholastic failure; and further

stated that the courts will not intrude into the domain of academic standards where school, not judicial, officials are those properly qualified to execute judgment. However, the courts are not totally precluded from examining scholastic dismissals. If the student was actually expelled for reasons other than the quality of his work or if the student failed because of bad faith or arbitrary or capricious action by an instructor, the courts will order the granting of a fair and impartial hearing. Brookins v. Bonnell, 362 F.Supp. 379 (D.C. E.D.Pa. 1973).

Despite the immunity accorded in academic matters, the determination by educational authorities of a student's academic or emotional fitness may be actionable if the adverse determination complained of is motivated by bad faith; where a medical student has been dismissed for failure to attain the proper standard of scholarship, two questions may be involved: the first, was the student in fact delinquent in his studies or unfit for the practice of medicine; secondly, were the school officials motivated by malice or bad faith in dismissing the student, or did they act arbitrarily or capriciously. In general, the first question is not a matter for judicial review. However, a student dismissal motivated by bad faith, arbitrariness or capriciousness may be actionable. Depperman v. University of Kentucky, 371 F.Supp. 73 (D.C. E.D.Ky. 1974).

As was stated in Keys v. Sawyer, 353 F.Supp. 936 (D.C. S.D.Tex. 1973), university officials should have broad discretionary power to determine the fitness of a student to continue his studies. There is a compelling need and very strong policy consideration in favor of giving local school officials the widest possible latitude in the management of school affairs, and only when there is a clear and convincing showing that an official acted in an arbitrary and capricious manner will the federal courts interfere with the exercise of such discretionary power.

In support of her position, plaintiff relies strongly on Greenhill v. Bailey, — F.2d —, in which the Court of Appeals for

the Eighth Circuit reversed the District Court. The Court of Appeals found that the officials of the University of Iowa College of Medicine had by its action been guilty of denigrating Greenhill's intellectual ability, as distinguished from his performance, and that the action deprived him of a significant interest in liberty, for it admittedly imposed on him a stigma or other disability that forecloses his freedom to take advantage of other opportunities. In reversing the District Court, the Court of Appeals found that the school, by its officials, sent to the Association of American Medical Colleges in Washington, D. C., a form upon which it was indicated that Greenhill had been dismissed "due to Poor Academic Standing" and that the apparent reason therefor was "lack of intellectual ability or insufficient preparation."

Greenhill is readily distinguishable from the present case as shown by the facts enumerated in this opinion.

In the decision of the Court of Appeals, the Court stated:

> "We are well aware that there has long been a distinction between cases concerning disciplinary dismissals, on the one hand, and academic dismissals, on the other. See Brookins v. Bonnell, supra, 362 F.Supp. at 382, and the cases collected therein. Our holding today is not an effort to blur that distinction but rather an acknowledgment that the dictates of due process, long recognized as applicable to disciplinary expulsions (and suspensions of significant length), may apply in other cases as well, where the particular circumstances meet the criteria articulated by the Supreme Court in Board of Regents v. Roth, supra, and Perry v. Sindermann, supra."

At the conclusion of the opinion, and specifically appearing in Footnote 12 thereof, appears the following:

> "Since this case must be remanded for future administrative proceedings, we do not reach Greenhill's contention

that he was denied substantive due process. However, we think this additional caveat is appropriate: For a court to overturn a student's dismissal on substantive grounds it must find that such dismissal was arbitrary and capricious. (citing cases). That standard is a narrow one, to be applied only where administrative action 'is not supportable on any rational basis' or where it is 'willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case.' First National Bank v. Smith, 508 F.2d 1371, 1376 (8th Cir. 1974). Educational institutions can judge a student's performance better than can a court of law, particularly in an advanced field such as the study of medicine. (citing cases). Only the most compelling evidence of arbitrary or capricious conduct would warrant our interference with the performance evaluation (grades) of a dismissed student made by his teachers."

The evidence presented in this case totally failed to establish that plaintiff was expelled for any reason other than the quality of her work. It also failed to show that dismissal was because of bad faith, arbitrary or capricious action by any instructor. The evidence presented is strongly to the contrary; it appearing that plaintiff's docent went to great lengths and extremes in his efforts to assist the plaintiff in every phase of her education, repeatedly calling to her attention deficiencies noted by the school authorities.

Considering all of the evidence presented, the Court finds that the grading and evaluating system of the medical school was applied fairly and reasonably to plaintiff, but plaintiff did not satisfy the requirements of the medical school to graduate from the medical school in June, 1973.

The Court further finds that plaintiff's performance in the medical school and after having been placed on probation for

an extended period of time did not warrant her being continued in the medical school beyond June, 1973, inasmuch as she had been placed on probation and was repeatedly cautioned of her deficiencies and had been given a year within which to correct the noted deficiencies.

The Court further finds that the progress status of plaintiff in the medical school was evaluated in a manner similar to and consistent with the evaluation of other similarly situated students, with the exception that plaintiff's docent, namely William Sirridge, went to even greater lengths to assist plaintiff in an effort for her to obtain her M.D. degree, than he did for any of his other students. In the opinion of the court, his assistance to the plaintiff went far beyond the call of duty. There was no evidence that plaintiff was in any manner evaluated differently from other students because of her sex or because of her religion. With regard to plaintiff's physical appearance, this in and of itself did not cause plaintiff to be evaluated any differently than any of the other students; however, plaintiff's unkempt appearance and condition were much cause for concern with both faculty and students, and this was brought to her attention on numerous occasions; but she was not treated in any other manner than any other student with similar deficiences would have been treated.

There was no evidence concerning plaintiff's payment of tuition or assessed expenses; thus, the Court assumes they were paid in a timely manner.

The primary goal of U.M.K.C. Medical School is the graduation of students with an M.D. degree, capable of practicing medicine as a physician. The Court does not find that plaintiff has suffered any damage by any improper acts on the part of any of the defendants. The Court finds that defendants acted properly in evaluating plaintiff's academic performance and in denying graduation and in dismissing plaintiff from medical school.

since the evidence overwhelmingly showed plaintiff was not capable of performing as a medical doctor.

The Court further finds that during plaintiff's enrollment and during her attendance at medical school, she was advised, and fully understood, that a requirement to graduate with the degree Medical Doctor was that she acquire at least a degree of clinical skills required by the average medical schools in the United States.

As to whether plaintiff was advised prior to May 18, 1973, that her performance at pediatrics was so deficient that it would be relied on in part to deny her promotion or graduation, or in any way impede her progress through medical school, is of little importance, since the performance in other fields and her proficiency generally were not adequate to permit, much less require, graduation from the school with a degree of Doctor of Medicine. Whether plaintiff has a reading knowledge of French, Russian and German and is experienced in medical writing and computer programming has no bearing on whether or not she is or was a proper candidate for graduation with a degree of Doctor of Medicine.

The Court has considered the procedural due process accorded the plaintiff and in the light of all of the evidence presented and in keeping with the case law heretofore expounded, including the most recent case by the Court of Appeals for the Eighth Circuit, namely, Greenhill v. Bailey, . . . F.2d . . ., finds that, under the facts of this case, plaintiff was afforded full procedural due process by the U.M.K.C. Medical School. In fact, the Court is of the opinion, and so finds, that the school went beyond the procedural due process by affording plaintiff the opportunity to be examined by seven independent physicians in order to be absolutely certain that their grading of the plaintiff in her medical skills was correct.

IT IS, THEREFORE, THE ORDER of this Court that judgment be and the same is hereby entered in favor of the defendants and against plaintiff, Charlotte M. Horowitz. Plaintiff to take nothing by her suit.

Costs to be assessed against the plaintiff. Execution to issue therefor.

s WILLIAM G. JUERGENS
Senior Judge

DATED: November 12, 1975